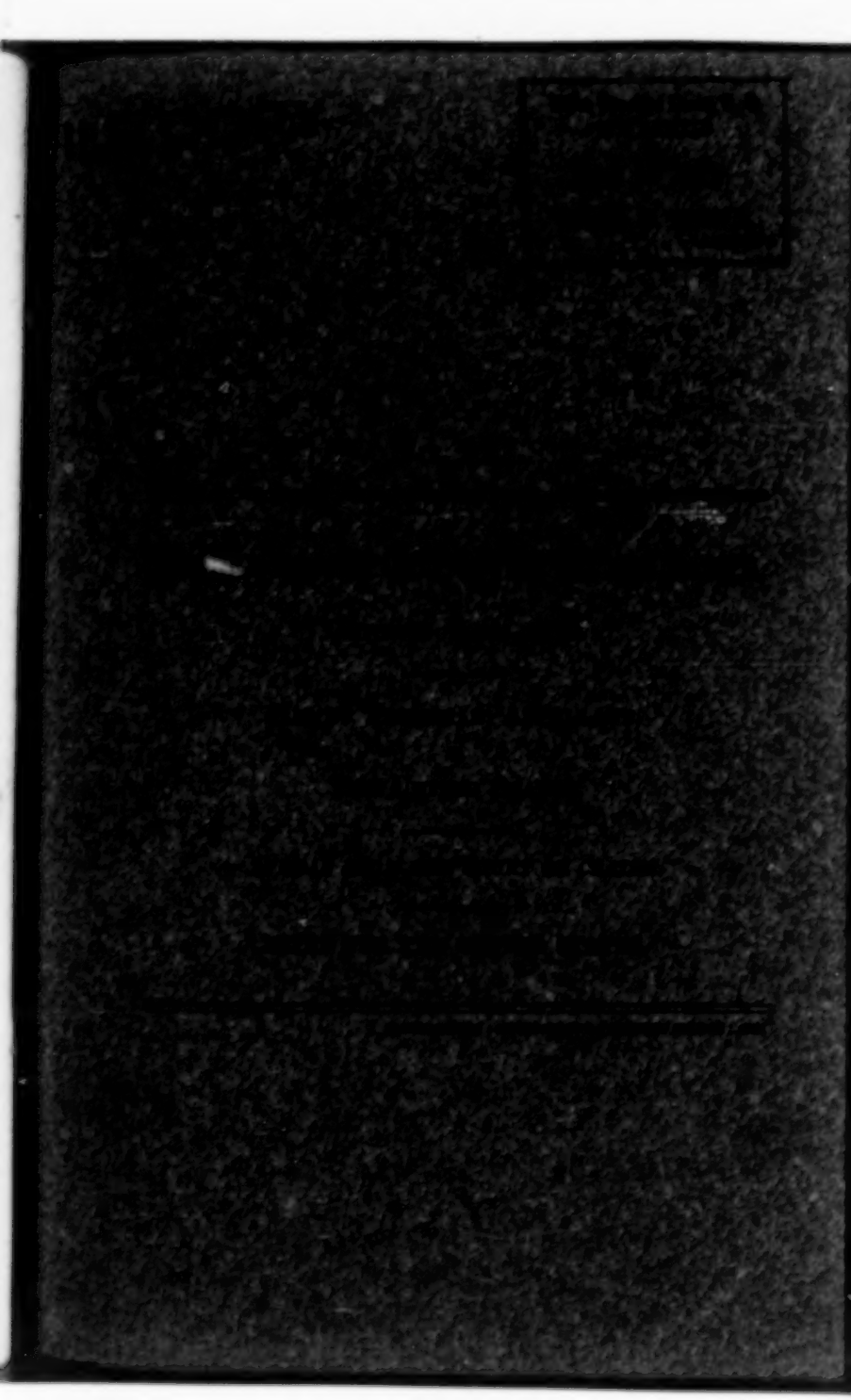

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

HENRY FRIEDMAN, APPELLANT,
v.
THE UNITED STATES. } No. 221.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

This is an appeal from a judgment of the Court of Claims dismissing a petition seeking the recovery of the sum of $3,600, claimed by appellant to have been excessively exacted by the Government in payment for certain coal lands.

THE FACTS.

On or about December 1, 1909, appellant filed in the United States land office at Salt Lake City, Utah, an application to purchase a certain 160-acre tract of coal land.

Subsequently appellant filed therein an affidavit setting forth that he had expended about $125 in developing the vein of coal on said land "and also the sum of $8,000, the amount of the purchase price charged by the United States for said tract," which said moneys were from his own personal funds.

Thereafter, on March 2, 1910, appellant relinquished any claim in and to a portion of the land described in his application, namely, 40 acres thereof.

On March 21, 1910, the register of the general land office at Salt Lake City issued to appellant a certificate showing the purchase by appellant of the 120-acre tract at the rate of $50 per acre, amounting in all to $6,000, and that appellant had paid said purchase price in full.

On January 16, 1911, a patent was duly issued to appellant for said land.

It further appears that prior to appellant's application to purchase the land in question, viz, on April 12, 1907, the Land Department adopted regulations under which said land and other coal land, belonging to the Government, were appraised, and that the land purchased by appellant was appraised at $50 per acre, which fact appellant knew when he filed his application as aforesaid.

Said lands purchased by appellant were at the time of purchase within 15 miles of a completed railroad.

On October 7, 1914, appellant applied to the Commissioner of the General Land Office for the repayment, under section 2 of the act of March 26, 1908, c. 102 (35 Stat., 48), of $3,600 of the purchase price of said land, alleging that the price charged him was to that amount in excess of the price fixed by law. On August 9, 1915, the Commissioner denied said application, and thereupon appellant appealed to the Secretary of the Interior, who, on

February 29, 1916, affirmed the decision of said Commissioner, on the ground that the price charged for said land was authorized by law (sections 2347–2351, Revised Statutes) and the regulations prescribed by the Land Department in pursuance thereof.

Appellant then filed, on July 31, 1918, his petition in the court below, alleging that the correct price of the land purchased by him was, under section 2347, Revised Statutes, $20 per acre, and not $50, as charged by the Government, and prayed for the recovery of the $3,600 excess.

A motion to dismiss said petition was presented by the Government, which was, however, ordered postponed to the hearing on the merits. On said hearing the petition was dismissed, and this appeal seeks to review the judgment of dismissal.

THE STATUTE.

The provisions of law with reference to the entry of coal lands, so far as the present case is concerned, may be found in the Revised Statutes, sections 2347 to 2352. These sections are almost a literal reenactment of the provisions contained in the act of March 3, 1873, c. 279 (17 Stat. 607).

Section 2347 provides:

> Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have

> the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of *not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.* [Italics ours.]

The only other pertinent portion of the statute is that part of section 2351 reading as follows:

> The Commissioner of the General Land-Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

REGULATIONS OF THE COMMISSIONER OF THE GENERAL LAND OFFICE.

The regulations of 1873 and 1882.—Shortly after the passage of the original act of 1873, the Commissioner of the General Land Office, to make effective the provisions of the statute, promulgated his regulations dated April 15, 1873 (Copp's Public Land Laws, ed. 1875, p. 667), which, among other things, fixed the prices of coal lands at the minimum prices set forth in the statute. Paragraph 9 provided:

> The price per acre is $10 where the land is situated *more* than fifteen miles from any completed railroad; and $20 per acre where the land is *within* fifteen miles of such road (pp. 667, 668).

Paragraph 11 of said regulations defined the meaning of the term "completed railroad" and provided that—

> lands within fifteen miles of any point of a railroad so constructed will be held and disposed of at $20 per acre (p. 668).

The same provisions reappear in the Commissioner's regulations dated July 31, 1882 (1 L. D. 687, 689). See paragraphs 12 and 15 thereof.

The regulations of 1907.—By his regulations issued April 12, 1907 (35 L. D. 665), the Commissioner departed from the former practice of disposing of all coal lands at the fixed prices of $10 and $20 per acre, depending upon their distance from a completed railroad, and adopted the more businesslike method of classifying the lands and fixing the prices thereof according to the relative value of the several tracts. Paragraph 6 of said regulations provided:

> Information will be furnished registers and receivers by the Commissioner of the General Land Office of the price at which all coal lands in their respective districts will be offered. The local land offices will from time to time be furnished with schedules and maps (1) showing lands known to lie without ascertained coal areas and open to entry under the general land laws, according to the character of each particular tract; (2) showing lands known to contain workable deposits of coal, whereon prices will be fixed upon information derived from field examination; and (3) showing lands containing coal of such character as may, from

> their location at a distance from transportation lines, be sold at the minimum price fixed by the statute as hereinafter stated.
>
> Local land officers will allow *coal* entries for lands in the first and third classes at the minimum price fixed by the statute, *and for those in the second class at the prices stated in the schedules and maps furnished them.* [Italics ours.] Lands listed in classes 2 and 3 are subject to entry under the coal-land laws only, unless shown by the applicant to be of such character as to be subject to entry under some other law. * * * (Pp. 667, 668.)

It was under these later regulations that the land purchased by appellant was classified and the price thereof fixed at $50 per acre, facts of which appellant was well aware when his application to purchase was filed.

THE OPPOSING CONTENTIONS.

The only question presented for decision is as to the power of the Commissioner of the Land Office to classify coal lands and fix the price thereof at figures above those stated in the statute.

Appellant contends that section 2347, Revised Statutes, directs that coal land shall be enterable at the fixed prices of $10 and $20 per acre, depending upon the distance of said land from a completed railroad, and does not either expressly or by implication authorize an executive officer to require entrymen to pay any other or different prices than those specified; that the regulations of the Land Department providing for the appraisal of coal lands and the sale of the same at the appraised prices are in excess of the statute, and therefore void.

It is the contention of the Government that the statute only attempts to prescribe minimum prices, and contemplates that the matter of actual price fixing, within the specified limits, shall be exercised by the Commissioner of the General Land Office by appropriate rules and regulations.

ARGUMENT.

I.

To construe section 2347, Revised Statutes, as prescribing fixed flat prices of $10 and $20 per acre for coal lands, as contended by appellant, would be to do violence to the plain wording of the statute.

The statute permits certain qualified persons to enter vacant surveyed coal lands of the United States upon the payment of "not less than $10 per acre" where the lands are situated more than 15 miles from a completed railroad and "not less than $20 per acre" where the lands are situated within 15 miles of such a road.

Appellant argues that the language used directs the sale of public coal lands at the fixed prices of $10 and $20 per acre.

To uphold such a contention would be to wholly read out of the statute the words "not less than"; to make the statute read as though the lands were enterable "*at*" $10 and "*at*" $20 per acre, and no more.

It can not be said that these words "not less than" have been inserted in section 2347 inadvertently, for they appear twice therein and were likewise contained in the original act of 1873.

The expression "not less than" has frequently been dealt with by the State courts, generally in the construction of criminal laws imposing fines of "not less than" a certain amount. Almost without exception, this language has been held simply to fix the minimum fine and not to limit the fine that may be imposed to that minimum.

Hankins v. *The People*, 106 Ill. 628, 633;
Drake v. *The State*, 5 Tex. App. 649, 665;
Chiles v. *The State*, 2 Tex. App. 36;
State v. *Miller*, 94 N. C. 904, 907;
People v. *Brooks*, 65 Cal. 295, 299;
Ex parte Cain, 20 Okla. 125;
White v. *The State*, 30 Ala. 518.
Rusch v. *City of Davenport*, 6 Iowa 443, 454, 455;
Worth v. *Peck*, 7 Pa. St. 268, 272;
Commonwealth v. *Brown*, 210 Pa. St. 29, 33–35;
Stewart v. *Griswold*, 134 Mass. 391, 392;
Gregg's Estate, 213 Pa. St. 260, 262, 263.

The only two cases which have given any other construction to this language, to which our attention has been called, are *Central* v. *Madden*, 81 S. C. 7, and *Stimpson* v. *Pond*, 2 Curtis 502. In both of these cases, however, the conclusion of the court was based upon a construction of the entire statute, from which the court found an intention upon which it based its decision. In both cases the amount claimed was the minimum amount allowed by the statute, and the decision of the case did not make it necessary to determine whether the statute in fact authorized a larger amount to be assessed.

Query. If the present statute read "not more than $20" would appellant then contend that it meant exactly "$20" and "not less than" $20?

It is obvious, therefore, from the plain wording of the statute, that Congress has only attempted to specify the minimum prices which may be charged for coal lands, and has left the actual fixing of the prices of particular tracts with the Commissioner under the power conferred upon him by section 2351 to issue "all needful rules and regulations for carrying into effect the provisions" of the statute.

II.

The language and intent of the statute being plain, there is left no room for construction.

Appellant has cited various early laws relative to the public lands, other than coal lands, which he declares indicate a general scheme or policy on the part of Congress to dispose of all public lands, when at private sale, at fixed flat prices. Examination of the statutes referred to shows that certain of them made provision for the disposition of the lands "*at*" certain specified prices. Of course such statutes could have no material bearing on the present case.

At all events, the language of the present statute being so perfectly clear, and the intent to leave the matter of price fixing with the Commissioner within the limits prescribed being so perfectly obvious, there is really no occasion to resort to exterior agencies to determine meaning and intent.

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Reference is made by appellant to the debates in Congress, which he claims tend to show that the members of that body believed that the statute fixed the prices of coal lands at the flat rates of $10 and $20 per acre.

Even if there were some ambiguity in the statute, this court has said:

> There is * * * a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. (*United States* v. *Freight Association*, 166 U. S. 290, 318, citing *United States* v. *Union Pacific Railroad Company*, 91 U. S. 72, 79; *Aldridge* v. *Williams*, 3 How. 9, 24, Taney, Chief Justice; *Mitchell* v. *Great Works Milling & Manufacturing Company*, 2 Story, 648, 653; *Queen* v. *Hertford College*, 3 Q. B. D. 693, 707.)
>
> See also *Maxwell* v. *Dow*, 176 U. S. 581, 601, 602;
>
> *Knowlton* v. *Moore*, 178 U. S. 41, 72;
> *Lapina* v. *Williams*, 232 U. S. 78, 90.

At most, the debates on the statute involved herein show merely a diversity of ideas as to the value of coal lands, minimum prices as low as $5 and $10 and as high as $20 and $100 being suggested, the bill finally passing with the minimum prices proposed by the Interior Department, $10 and $20 per acre.

Appellant also invokes the rule of executive construction. It is true, as he states, that for a period

of some thirty-four years, from 1873 to 1907, when the regulations assailed herein were promulgated, coal lands were disposed of at the prices of $10 and $20 per acre. But this was not done because the Land Department *construed* the statute as requiring entry at those figures. Those prices were fixed by the department by its regulations of 1873 and 1882 solely in the *administration* of the law, not in *construction* thereof. The department, with perfect validity, could have adopted in those regulations the scheme of appraisement which it later did in the regulations of 1907. The fact that the same prices mentioned in the statute were fixed by the earlier regulations is merely incidental.

Even if it should be the fact that the Land Department set the prices at $10 and $20 in the regulations of 1873 and 1882 in the belief that the statute so required—in other words, that its action was the result of a *construction* rather than an *administration* of the statute—such action could not of course override the plain language and intent of the legislation.

> It is only in cases of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material. (*United States* v. *Tanner*, 147 U. S. 661, 663.)

The earlier coal land legislation referred to by appellant (act of July 1, 1864, c. 205, 13 Stat. 343, and the act of Mar. 3, 1865, c. 107, 13 Stat. 529), if it has any material bearing in the present case

would tend rather to strengthen than to weaken the view of the present statute held by the Government.

The act of 1864, after providing that the President, with certain exceptions, might cause coal lands "to be offered at public sale to the highest bidder," after not less than three months' notice, "at a minimum price of twenty dollars per acre," further provided that any lands not thus disposed of should thereafter be liable to private entry "*at said minimum*," thus indicating a plain intent on the part of Congress that the lands should be sold at private sale at $20 per acre, the minimum price.

In the act of 1865, which made provision for the sale of coal lands to persons engaged in the business of bona fide actual mining on said lands, Congress expressly provided that such sale should be "at the minimum price of twenty dollars per acre, fixed in the coal and town property act of first July, eighteen hundred and sixty-four," indicating again the intent that the lands should be disposed of at the flat price of $20 per acre.

However, when Congress enacted the act of 1873, and subsequently carried the same into the Revised Statutes as sections 2347 to 2352, it departed absolutely from the wording used in the earlier statutes and made the land enterable "at not less than $10 per acre" and "at not less than $20 per acre." There is thus a refutation of the idea that the words "not less than" were inserted in the later legislation thoughtlessly or inadvertently.

If Congress had intended that coal lands should be enterable under the provisions of sections 2347–2352, Revised Statutes, at the fixed flat rates of $10 and $20 per acre, the minimum prices, it would unquestionably have resorted to language similar to that used in the earlier statutes, or that which it later employed in legislation making provision for the disposal of unsurveyed coal lands in Alaska.

The first act relating to Alaskan coal lands was that of June 6, 1900, c. 796 (31 Stat. 658), which simply extended to that district the provisions of sections 2347 to 2352, Revised Statutes. As those sections related only to surveyed lands, and as the coal lands of Alaska were not surveyed, said sections were practically inoperative. By the act of April 28, 1904, c. 1772 (33 Stat. 525), Congress amended the act of 1900 to provide for the entry of unsurveyed coal lands, and set the price thereof "at the sum of ten dollars per acre," showing the character of language it employs when it intends to establish a fixed, immutable price.

Appellant lays particular stress upon certain language used by this court in *United States* v. *Trinidad Coal Co.*, 137 U. S. 160, 170. In that case the court spoke of the small price per acre required of entrymen upon coal lands and the purpose of Congress to dispose of such lands at prices below their actual value. Examination of the case, however, shows that the present question was not involved. The case, briefly, was a suit by the Government to cancel certain

patents to coal lands claimed to have been illegally held by the defendant company. It appears that the company had furnished to certain of its officers, stockholders, and employees funds with which to purchase said lands; that said persons had made entry as individuals, and had afterwards conveyed the lands to the corporation. The point under discussion when the court used the expressions referred to was whether the Government was compelled, upon equitable principles, as a prerequisite to the cancellation of the patents, to refund the money which had been furnished by the defendant to the several persons to whom such patents were issued. The court was not engaged in the construction of the provisions of the statute herein involved, nor was such a construction necessary to the decision of the question presented.

The regulations of the Land Department under which appellant's land was classified and appraised and whose validity he now questions were promulgated in April, 1907, and appeared in the official publication "Land Decisions," volume 35. Congress knew of those regulations, as well as of the decisions of the Land Department upholding the same. (See cases of *Wm. G. Plested et al.*, 40 L. D. 610; *Wm. McGinley*, 44 L. D. 583.) It knew of the continuance of the scheme of classification and appraisement by subsequent regulations. (See regulations of April 10, 1909, 37 L. D. 653, and of July 7, 1917, 46 L. D. 131.) Further information on the subject was conveyed to Congress by annual reports

of the Secretary of the Interior. For instance, in his report for the year 1907, the Secretary said (p. 14):

> In order to determine what lands were underlain with coal, I had the Geological Survey during the last summer examine about 14,500,000 acres. Under the law the coal lands were subject to entry at the minimum prices of $10 and $20 an acre, in accordance with their proximity to railways. It was unwise to longer continue the minimum as the only price, as many of these lands are of very much greater value than the minimum and should not be disposed of except for a price commensurate with their value. Upon the report of the Geological Survey I have had the lands classified and restored to entry at the prices fixed in accordance with this classification.

In his report for 1909 the Secretary said (pp. 8, 9):

> April 10, 1909, I changed to a practical and scientific basis the system of classification and valuation for disposition of coal lands under existing laws. For the purposes of classification and valuation, the coal deposits are divided into four classes in accordance with their fuel value and the thickness and depth of the coal beds. The prices of the lands are determined on the basis of an estimated tonnage and range from one-half cent to three cents per estimated ton, in accordance with the quality, thickness, and situation of the coal. Provision is also made for taking into consideration in making the valuation any special conditions

> enhancing the value of the land for coal-mining purposes; also, for a review of the classification or valuation upon proper application and showing to the department.

He then showed that the coal land classified and appraised that year had a sale price of $141,890,576, as against only $47,080,040, the sale price estimated at the minimum, a gain of $94,810,536. He then went on to report:

> The classification and appraisement of the coal lands in the States and Territories other than Alaska proceed upon the authority of the act of March 2 [3], 1873, which fixes the minimum price only for lands and leaves to the Secretary of the Interior their appraisement and the determination of their maximum value. In view of the fact that the law of Alaska directs the disposition of the coal lands in that Territory at the flat rate of $10 per acre, no such classification or appraisement is warranted by existing law.

Despite its knowledge of the change in the scheme of fixing the prices of coal lands effected by the regulations of 1907 and of the fact that money appropriated to the Interior Department was being used for the purpose of classification and appraisement of such lands, Congress took no steps looking to the repeal or amendment of the statute upon which said regulations were based. It seems reasonable to presume, therefore, that this new scheme of appraising coal lands according to their real value has received legislative sanction. (See *United States* v. *Midwest Oil Co.*, 236 U. S. 459.)

Much is said by appellant as to the supposed policy of the Government to dispose of the public coal lands at nominal figures so that men of small capital may be encouraged to open mines, to the end that the coal lands may be more rapidly developed and the product cheapened to the public. Whether or not this be the policy, this court has said in *Hadden* v. *The Collector*, 5 Wall. 107, 111, 112:

> What is termed the policy of the Government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes.

See also *Bate Refrigerating Co.* v. *Sulzberger*, 157 U. S. 1, 37;

Dewey v. *United States*, 178 U. S. 510, 521;

United States v. *First National Bank*, 234 U. S. 245, 260.

As a matter of fact, policies are as changeable as the winds. The policy of the Government may have been as appellant has stated in the earlier days of the country, but in course of time it has been seen that interests have taken advantage of the low prices and have acquired properties to hold for speculation, rather than to use for development. Then, too, the desirability of obtaining prices commensurate with the true value of the lands is a consideration of no mean importance, and probably was a persuasive factor in the decision of the Land Department to

abandon the practice of pricing the lands at the minima prescribed by the statute.

Within recent years this Government has unquestionably taken steps forward in connection with its national policies, in the interest of better business administration and the conservation of our natural resources.

At all events, it is plainly apparent, from the wording of the present statute, that Congress intended to and did fix only the minimum prices of coal lands and vested the Land Department with the power to establish actual prices under appropriate rules and regulations. The adoption of the forced construction urged by appellant would be productive only of much litigation on the part of purchasers who have paid the higher appraised prices, and, at the ridiculously low and inadequate figures mentioned in the statute, would most certainly result in the complete and rapid monopolization of our remaining coal domain.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

WILLIAM L. FRIERSON,
Solicitor General.

W. MARVIN SMITH,
Assistant Attorney.

FEBRUARY, 1921.

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